No. 14-770

IN THE

Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

This case concerns nearly $2 billion of bonds in which Bank Markazi, the Central Bank of Iran, held an interest in Europe as part of its foreign currency reserves. Plaintiffs, who hold default judgments against Iran, tried to seize the assets. While the case was pending, Congress enacted a special provision of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. §8772, directed to this case. By its terms, that provision applies only to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." *Id.* §8772(b). It expressly disclaims any effect on "any [other] proceedings." *Id.* §8772(c)(1). "In order to ensure that Iran is held accountable for paying the judgments," §8772 provides that, notwithstanding any other state or federal law, the assets "shall be subject to execution" upon only two findings—essentially, that Bank Markazi has a beneficial interest in them and that no one else does. *Id.* §8772(a)(1)-(2). The question presented is:

Whether §8772—a statute that effectively directs a particular result in a single pending case—violates the separation of powers.

PARTIES TO THE PROCEEDINGS BELOW

Due to its length, the list of parties to the proceedings below is set forth in full in the appendix to the petition for a writ of certiorari (Pet. App. 130a-144a).

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BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

This case concerns Congress's enactment of a new rule for a single pending case—identified by caption and docket number—that has no prospective effect beyond transferring nearly $2 billion from one party to others in compensation for past injuries.

The case began when plaintiffs, who hold default judgments against Iran, tried to seize securities in which Bank Markazi, the Central Bank of Iran, held an interest as part of its foreign currency reserves in Europe. While the case was pending, plaintiffs persuaded Congress to enact a statute designed to change the outcome of this one case.

The result was a special provision of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214, 1258, codified as 22 U.S.C. §8772. Section 8772 applies *only* to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. §8772(b). The statute expressly disclaims any effect on "any [other] proceedings." *Id.* §8772(c)(1).

Section 8772 explicitly sets forth Congress's goal: "to ensure that Iran is held accountable for paying the judgments." 22 U.S.C. §8772(a)(2). To that end, the statute supersedes all contrary laws, state and federal, for this one case. *Id.* §8772(a)(1). In their place, §8772 establishes a new rule under which the assets at issue "shall be subject to execution" if the court makes two findings—essentially, that Bank Markazi has a beneficial interest in the assets and that no one else does. *Id.* §8772(a)(1)-(2).

That legislative intrusion into a single pending case—changing the law so plaintiffs can collect nearly $2 billion from their adversary—violates the separation of powers. Deciding individual cases is a judicial function, not a legislative one. If the distinction between the legislative and judicial functions means anything, Congress cannot change the law solely for one case to ensure that its favored litigant prevails. Section 8772 is foreign to this Nation's constitutional traditions and threatens the independence of the federal judiciary. It cannot be sustained.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 758 F.3d 185 (2d Cir. 2014). The opinions and orders of the district court (Pet. App. 13a-127a) are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on July 9, 2014. It denied rehearing and rehearing en banc on September 29, 2014. Pet. App. 128a. Bank Markazi filed the petition for a writ of certiorari on December 29, 2014, and the Court granted the petition on October 1, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND TREATY PROVISIONS INVOLVED

Relevant provisions of Article III of the U.S. Constitution; the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772; the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.*; the Terrorism Risk Insurance Act of 2002, 28 U.S.C. § 1610 note; the Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899; and Article 8 of the Uniform Commercial Code are set forth in an appendix to this brief. App., *infra*, 1a-44a.

STATEMENT

I. STATUTORY FRAMEWORK

This case arises against the backdrop of state property law as well as federal law governing the immunity of foreign sovereigns and their property.

A. Article 8 of the Uniform Commercial Code

Article 8 of the Uniform Commercial Code governs the ownership and transfer of securities. Before the advent of modern securities trading, the owner of a financial instrument typically held a physical certificate. The owner of 10,000 shares of Coca-Cola stock, for example, would hold certificates issued by Coca-Cola representing that ownership, which entitled him to vote and receive dividends from Coca-Cola.

In modern financial markets, securities owners rarely possess such certificates. Instead, when buying stock, they acquire a "security entitlement" against an intermediary such as a bank or broker. The securities intermediary, in turn, owns the underlying financial asset or owns a security entitlement in that asset through yet another intermediary, so that it can provide the benefits of ownership to its customer. See generally U.C.C. art. 8 prefatory note (1994); 7A William D. Hawkland, *et al.*, *Uniform Commercial Code Series* §8-101 (2013); Carl S. Bjerre & Sandra M. Rocks, *The ABCs of the UCC: Article 8: Investment Securities* 1-9 (2d ed. 2014).

U.C.C. Article 8 and its foreign counterparts define the property rights in those security entitlements. Under Article 8, the owner of a security entitlement has the right to receive payments, cast votes, and exercise other incidents of ownership of the underlying financial asset. U.C.C. §§8-505 to 8-508. But the owner does not hold those rights against the issuer. Instead, he holds them against his securities intermediary. *Ibid.* In that manner, Article 8 enables the widespread holding and sale of securities without cumbersome transfers and re-registrations of the underlying certificates.

Because Article 8 is built on potentially lengthy chains of ownership from intermediary to intermediary, it carefully identifies the owners of attachable property rights in security entitlements. In particular, §8-112(c) provides that "[t]he interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary *with whom the debtor's securities account is maintained.*" U.C.C. §8-112(c) (emphasis added). Thus, if a debtor holds a security entitlement in a bond with Bank A, which in turn holds an entitlement in that bond with Bank B, the

debtor's property consists solely of the entitlement the debtor holds against Bank A. Creditors may be able to seize the debtor's security entitlement at Bank A. But they cannot go beyond that and attach Bank A's holdings at Bank B to satisfy the debtor's obligations.

The official comment explains:

> Process is effective only if directed to the debtor's *own* security intermediary. If Debtor holds securities through Broker, and Broker in turn holds through Clearing Corporation, *Debtor's property interest is a security entitlement against Broker.* Accordingly, Debtor's creditor cannot reach Debtor's interest by legal process directed to the Clearing Corporation.

U.C.C. §8-112 cmt. 3 (emphasis added); see also 7A Hawkland, *supra*, §8-112:01 ("Since [the debtor's] property interest is 'located' at [its intermediary], * * * the only proper subject of legal process by [the debtor's] creditors would be [that intermediary]. [The intermediary's intermediary] does not have possession of some item of property in which [the debtor] has a direct property interest * * * ").

B. The Foreign Sovereign Immunities Act

While property interests are normally created and defined by state law, federal law governs the extent to which foreign sovereigns and their property are subject to process in the Nation's courts.

1. For most of the country's history, foreign sovereigns were completely immune from suit. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, however, the State Department adopted the "restrictive" theory that recognized limited exceptions. *Id.* at 486-487. Two decades later, Congress codified those

immunity principles in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§1602 *et seq.*).

The FSIA separately addresses the immunity of foreign sovereigns from jurisdiction, and the immunity of sovereign property from execution and attachment. With respect to the former, the FSIA preserves the general rule that a foreign state and its agencies and instrumentalities "shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. §1604. The statute lists narrow exceptions to that jurisdictional immunity in §1605.

Sovereign *property* was traditionally immune from execution, even under the restrictive theory. See H.R. Rep. No. 94-1487, at 8 (1976). Consistent with that history, the FSIA provides that, in general, "property in the United States of a foreign state shall be immune from attachment arrest and execution." 28 U.S.C. §1609. The FSIA created narrow exceptions, but only for certain categories of "property in the United States." *Id.* §1610(a)-(b).

Section 1611(b) provides an additional, special immunity for central bank assets. "Notwithstanding the provisions of section 1610," it states, "the property of a foreign state shall be immune from attachment and from execution, if * * * the property is that of a foreign central bank or monetary authority held for its own account * * * " 28 U.S.C. §1611(b)(1); see *NML Capital, Ltd.* v. *Banco Central de la República Argentina*, 652 F.3d 172, 186-195 (2d Cir. 2011), cert. denied, 133 S. Ct. 23 (2012).

2. The FSIA focuses on immunity, not substantive liability. As a result, it did not originally address whether a juridically separate agency or instrumentality could be

held liable for the sovereign's own debts, or vice versa. See H.R. Rep. No. 94-1487, at 12, 28-30.

This Court decided that issue in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). "[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign," it held, "should normally be treated as such." *Id.* at 626-627. The Court recognized only two narrow exceptions: where the entities are alter egos and where the corporate form is abused to work a fraud or injustice. *Id.* at 629-630.

C. The FSIA's Terrorism Exceptions

In 1996, Congress created a new exception to jurisdictional immunity for terrorism-related claims. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §221, 110 Stat. 1214, 1241 (formerly codified at 28 U.S.C. §1605(a)(7)). That exception permits suits against certain sovereigns for acts of terrorism or material support therefor. 28 U.S.C. §1605A(a).

The 1996 amendments also added new exceptions to immunity from execution. One provides that a foreign state's property "used for a commercial activity in the United States" is not immune from execution for terrorism-related judgments. 28 U.S.C. §1610(a)(7). A similar exception applies to certain property of agencies or instrumentalities. *Id.* §1610(b)(3).

Following those amendments, scores of suits were filed against foreign sovereigns. Typically, the sovereign did not appear, and plaintiffs obtained default judgments for tens or hundreds of millions of dollars. See Jennifer K. Elsea, Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism* 67-74 (Aug. 8, 2008). Plaintiffs, however, faced difficulty collecting. See

id. at 5-68. Congress responded by enacting further exceptions to immunity.

In 2002, Congress enacted §201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322, 2337, to permit execution against assets the President had "blocked" (*i.e.*, frozen) under certain economic-sanctions statutes. It provides:

> Notwithstanding any other provision of law, * * * in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) * * * , the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution * * *

28 U.S.C. §1610 note §201(a). By its terms, TRIA applies only to "blocked assets *of* that terrorist party"—*i.e.*, property *owned* by that party. See *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934, 937-941 (D.C. Cir. 2013); cf. *Calderon-Cardona* v. *Bank of N.Y. Mellon*, 770 F.3d 993, 1000-1002 (2d Cir. 2014), petition for cert. filed, No. 15-122 (July 24, 2015).

In 2008, Congress amended the FSIA yet again. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §1083, 122 Stat. 3, 338. It created an express cause of action for terrorism claims while broadening the available damages. 28 U.S.C. §1605A(c)-(d). It expanded the assets available for execution. *Id.* §1610(g). And it allowed plaintiffs who had already litigated their case to judgment to assert claims under the new statute. Pub. L. No. 110-181, §1083(c)(2), 122 Stat. at 342.

II. PROCEEDINGS BELOW

This case concerns Congress's latest attempt to facilitate collection by terrorism plaintiffs. This time, however, Congress chose to change the rules for only a single case, enacting a statute that had no forward-looking effect beyond requiring one party to pay money to other parties.

A. Proceedings Before the District Court

Petitioner Bank Markazi is the Central Bank of Iran. Pet. App. 2a. Founded in 1960, the bank is an independent and distinct legal entity, separate from the Iranian government. C.A. App. 1340. Under Iranian law, it is treated as a joint stock company except as otherwise provided by Iran's Monetary and Banking Law. *Ibid.*

Like other central banks, Bank Markazi holds foreign currency reserves to carry out monetary policies such as maintaining price stability. C.A. App. 1330. Like other central banks, it often maintains the reserves in bonds issued by foreign sovereigns or "supranationals" like the European Investment Bank. *Id.* at 1331, 1146-1149.

Plaintiffs hold billions of dollars of default judgments against the Islamic Republic of Iran arising out of terrorist attacks by organizations that allegedly received support from Iran. Pet. App. 2a, 52a-53a n.1, 116a. Bank Markazi is not a party to any of those judgments and is not alleged to have been involved in the attacks. See *id.* at 52a-53a n.1.

1. *The Restraints and Blocking Order*

As part of its foreign currency reserves, Bank Markazi held $1.75 billion in security entitlements in foreign government and supranational bonds at Banca UBAE S.p.A., an Italian bank. Pet. App. 2a; C.A. App. 1329-1332, 1779. UBAE, in turn, held corresponding security entitlements

in an account with another intermediary, Clearstream Banking, S.A., in Luxembourg. Pet. App. 2a, 57a-59a. Clearstream, in turn, held security entitlements in an account at Citibank, N.A., in New York. *Id.* at 2a.[1]

Upon learning of those assets, plaintiffs did not try to attach Bank Markazi's security entitlements at UBAE in Italy, as U.C.C. Article 8 required. Instead, they served restraining notices on Clearstream and Citibank, seeking to attach the assets *Clearstream* held at Citibank in New York. Pet. App. 3a, 62a. Clearstream moved to vacate the restraints. On June 23, 2009, the district court "agree[d] with Clearstream that the assets * * * are governed by NY UCC 8-112(c)" and that, "[u]nder the plain meaning of NY UCC 8-112(c), Clearstream is not a proper garnishee" because "Clearstream does not currently carry on its books * * * an account in the name of the Islamic Republic of Iran." *Id.* at 126a. Nonetheless, the court left the restraints in place so plaintiffs could pursue a fraudulent conveyance theory. *Ibid.*

In June 2010, plaintiffs commenced this action against Bank Markazi, UBAE, Clearstream, and Citibank for turnover of the restrained assets under TRIA. Pet. App. 3a, 62a-63a. Later, in February 2012, the President issued an order blocking all "property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States," citing purported "deceptive practices" and "deficiencies in Iran's anti-money laundering regime." Executive Order No. 13,599, 77 Fed. Reg. 6659, 6659 (Feb. 5, 2012). Citi-

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[1] The bonds matured during the proceedings below, leaving Citibank with the cash proceeds. Pet. App. 61a. At the time of the district court's decision, the assets were worth $1.895 billion. *Id.* at 23a.

bank then reported the restrained assets as blocked by that order. Pet. App. 64a.

Bank Markazi moved to dismiss, and plaintiffs moved for summary judgment. Pet. App. 3a, 55a. Bank Markazi urged that the security entitlements Clearstream held against Citibank in New York were not Bank Markazi's property under U.C.C. Article 8. As a result, they were not "assets of" Bank Markazi within the meaning of TRIA and were not subject to execution under that statute. *Id.* at 96a-97a. Even if they were, Bank Markazi argued, the assets were entitled to central bank immunity under §1611(b) of the FSIA. *Id.* at 102a. Bank Markazi also invoked the Treaty of Amity between the United States and Iran, which prohibits unreasonable or discriminatory treatment of Iranian companies and requires that their separate juridical status be respected. *Id.* at 101a; see Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, arts. III.1, IV.1, Aug. 15, 1955, 8 U.S.T. 899, 902-903.

2. *Congress's Enactment of §8772*

Plaintiffs' lawyers then lobbied Congress to change the outcome of the case. According to press accounts, one of the plaintiffs' counsel in this case "[d]rafted" legislation to "preempt[] Uniform Commercial Code provisions that insulate indirectly held assets from judgment creditors." Julie Triedman, *Can U.S. Lawyers Make Iran Pay for 1983 Bombing?*, Am. Law., Oct. 28, 2013. A lobbyist working with the government relations team at one of the plaintiffs' law firms then "pressed lawmakers to add [the] provision to a new Iran sanctions bill." *Ibid.*

Press coverage reported that "lawyers and lobbyists for victims of terrorist attacks were quietly jockeying" over the legislation, and that Senator Bob Menendez was "'working with all of the plaintiff groups to ensure that

the approximately $2.5 billion in Iranian blocked assets located in New York are available.'" Kate Ackley, *Rival Groups of Terror Victims Square Off*, Roll Call, May 22, 2012. Senator Menendez issued a press release explaining that the bill "makes it so that the [plaintiffs] will be able to attach two billion in Iranian Central Bank assets being held at a New York Bank." *Menendez Hails Banking Committee Passage of Iran Sanctions Legislation* (Feb. 2, 2012).

The result was § 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214, 1258, codified as 22 U.S.C. § 8772. Section 8772 explicitly targets this one case: It applies only to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. § 8772(b). The statute explicitly disclaims any effect on any other proceeding: "Nothing in this section," it declares, "shall be construed * * * to affect the availability, or lack thereof, of a right to satisfy a judgment * * * in *any proceedings other than [these] proceedings* * * * " *Id.* § 8772(c)(1) (emphasis added).

For this one case, § 8772 fundamentally alters the governing rules, preempting state law and superseding other federal requirements. It provides:

> [N]otwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law, a financial asset that is—
>
> (A) held in the United States for a foreign securities intermediary doing business in the United States;

> (B) a blocked asset (whether or not subsequently unblocked) * * * , and
>
> (C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran * * * , that such foreign securities intermediary or a related intermediary holds abroad,
>
> shall be subject to execution or attachment in aid of execution in order to satisfy any judgment * * *

22 U.S.C. §8772(a)(1).

The statute prescribes two "determination[s]" the court must make. 22 U.S.C. §8772(a)(2). "In order to ensure that Iran is held accountable for paying the judgments," the court must determine (1) "whether Iran holds equitable title to, or the beneficial interest in, the assets," and (2) "that no other person possesses a constitutionally protected interest in the assets." *Ibid.* Although §8772 purports to preclude attachment to the extent a third party has "equitable title to, or a beneficial interest in, the assets," the statute excludes a "custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran." *Id.* §8772(a)(2)(A).

Section 8772 thus overrides U.C.C. Article 8 for this one case. Under Article 8, Bank Markazi's only potentially attachable property interest was in the security entitlements it held at UBAE in Italy. Clearstream may have held corresponding security entitlements in its Citibank account in New York. But the only property that could be seized to satisfy Bank Markazi's debts was its rights against UBAE. Section 8772 changed that, allowing plaintiffs to seize Clearstream's New York assets as if Bank Markazi owned them, while directing the court to

ignore Clearstream's or UBAE's stake in those assets as a mere "custodial interest."

3. *The District Court's Decision*

On February 28, 2013, the district court denied Bank Markazi's motion to dismiss and granted summary judgment to plaintiffs. Pet. App. 52a-124a.

The district court held that §8772 rendered U.C.C. Article 8 irrelevant. Section 8772, it held, "specifically trumps 'any other provision of law' and specifically permits execution on the assets specifically at issue in this litigation." Pet. App. 97a. Notwithstanding the prior ruling that Article 8 barred attachment, the court also held that the assets were subject to execution regardless of §8772, relying partly on purported statements of ownership by Bank Markazi and partly on its view that Bank Markazi's U.C.C. argument was "sophistry." *Id.* at 97a-98a & n.10, 101a.

With respect to the Treaty of Amity, the court ruled that §8772 rendered the issue moot by superseding the Treaty. Pet. App. 102a. It also found the Treaty inapplicable because, in its view, the Treaty could not be used to "circumvent congressional acts or authorized legal actions." *Ibid.* The court likewise rejected Bank Markazi's claim to central bank immunity, observing that §8772 "expressly preempt[s] any immunity." *Id.* at 103a. The court further held that TRIA trumps central bank immunity, and that the blocking order's reference to "deceptive practices" "suggests that the activities of Bank Markazi are not central banking activities." *Ibid.*

Finally, the court turned to §8772's required findings. "On this record and as a matter of law," it held, "no other entity could have an equitable or beneficial interest" in the assets. Pet. App. 111a. "Clearstream does not allege

* * * that it has legal title or the right to acquire that title for the Blocked Assets." *Id.* at 112a. "UBAE disclaims any 'legally cognizable interest' in the Citibank proceeds." *Ibid.* And Citibank simply "maintain[s] [an] account on behalf of another." *Ibid.* In short, "[t]here simply is no other possible owner of the interests here other than Bank Markazi." *Id.* at 113a.

Bank Markazi argued that §8772 violated the separation of powers by effectively dictating the outcome of this one case. Pet. App. 114a. Dismissing that argument in a single paragraph, the court stated: "The statute does not itself 'find' turnover required; such determination is specifically left to the Court." *Id.* at 114a-115a. The statutory findings, it opined, were not "mere fig leaves" but left "plenty for this Court to adjudicate." *Id.* at 115a.

After denying reconsideration, the court entered a judgment directing turnover of the assets. Pet. App. 13a-30a, 31a-51a. The judgment expressly released Citibank and Clearstream from any liability to Bank Markazi, and it enjoined Bank Markazi from asserting claims against them. *Id.* at 24a-26a.

B. The Court of Appeals' Opinion

The court of appeals affirmed. Pet. App. 1a-12a.

At the outset, the court acknowledged Bank Markazi's contentions that the assets were not subject to execution under TRIA because they were not "assets of" Bank Markazi, and that even if they were, they were protected by central bank immunity. Pet. App. 5a. But the court declined to reach those issues. "Congress," it explained,

"has changed the law governing this case by enacting 22 U.S.C. §8772." *Ibid.*[2]

The court of appeals then turned to Bank Markazi's separation-of-powers argument. The court recognized that, in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), this Court struck down a statute that directed courts to treat pardons of Confederate sympathizers as conclusive evidence of disloyalty. Pet. App. 8a. Congress, *Klein* declared, may not "prescrib[e] a rule of decision to the courts." *Ibid.* But the court of appeals also noted that this Court distinguished *Klein* in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992). Pet. App. 8a-9a. *Robertson* upheld a statute passed to resolve two environmental suits by providing that management of forests consistent with the statute's terms would be sufficient to satisfy other environmental requirements. *Ibid.*

The court of appeals found §8772 comparable to the statute in *Robertson*. "[Section] 8772 does not compel judicial findings under old law," it held, but rather "changes the law applicable to this case." Pet. App. 9a. And like the statute in *Robertson*, it "explicitly leaves the determination of certain facts to the courts." *Ibid.*

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[2] The court of appeals rejected Bank Markazi's argument that §8772 violated the Treaty of Amity. Any conflict between the two, it held, must be resolved in favor of "the later-enacted §8772." Pet. App. 5a. The court also denied the conflict. It acknowledged that the Treaty requires treatment of Iranian companies to be "'fair and equitable' and no 'less favorable than that accorded nationals and companies of any third country.'" *Id.* at 7a. But the court saw "no country-based discrimination," *ibid.*—despite the statute's multiple references to Bank Markazi's Iranian status and avowed purpose of "ensur[ing] that Iran is held accountable for paying the judgments," 22 U.S.C. §8772(a)(1)-(2).

Bank Markazi argued that §8772 "effectively compels only one possible outcome, as Iran's beneficial interest in the assets had been established by the time Congress enacted §8772." Pet. App. 10a. The court did not suggest otherwise. But it believed that *Robertson* made that fact irrelevant, "as the statute there was specifically enacted to resolve two pending cases." *Ibid.* "Indeed," the court added, "it would be unusual for there to be more than one likely outcome when Congress changes the law for a pending case with a developed factual record." *Ibid.*

The court conceded that "there may be little functional difference between §8772 and a hypothetical statute directing the courts to find that the assets at issue in this case are subject to attachment under existing law." Pet. App. 10a. But it held that, under *Robertson*, "§8772 does not cross the constitutional line." *Ibid.*

The court of appeals denied rehearing, Pet. App. 128a, but stayed the mandate, *id.* at 129a. This Court granted review. 136 S. Ct. 26 (2015).

SUMMARY OF ARGUMENT

I. Section 8772 prescribes a rule for a single pending case—identified by caption and docket number—with no prospective effect beyond transferring nearly $2 billion from one party to the others. The statute is an unprecedented incursion on the judicial power.

A. Article III grants the judiciary, not Congress, the power to decide "cases" and "controversies." The Framers chose those words to distinguish the *judicial* power of deciding specific cases from the *legislative* power of enacting general law. Legislation that purports to change the law for a single pending case, with no prospective impact beyond the payment of money, is inconsistent with that design.

That is what §8772 does. The statute alters the rule for a single case identified by docket number in the U.S. Code. It expressly disclaims any effect on any other proceeding. And it has no prospective effect at all. The impact could not have been more dramatic: The statute eliminated every defense Bank Markazi had raised.

B. Section 8772 defies the Nation's history and traditions. The Constitution was adopted against the backdrop of legislative interference in judicial proceedings at the behest of private factions. The separation of powers was designed to put an end to those abuses. Early state decisions enforced those principles by striking down statutes that targeted particular cases—laws far less extreme than the one here.

Congress's failure to enact comparable legislation throughout the Nation's history is compelling evidence that no such power exists. If Congress could change the law for a single pending case, it surely would have done so before now. But §8772 is virtually unprecedented.

C. Congress has undoubted authority to enact laws with forward-looking application, even if they affect pending disputes. But this Court has never approved a statute that applies only to a single pending *case*. The statutes this Court has upheld, moreover, involved matters such as prospective relief or public rights, as to which Congress has long been understood to have broad authority.

In *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), for example, this Court upheld a statute that designated a bridge a federal post-road to prevent its demolition. The statute targeted a specific *bridge*, but it did not purport to change the law

only for one *case*. The dispute, moreover, involved prospective relief and public rights—not money damages.

Robertson v. *Seattle Audubon Society*, 503 U.S. 429 (1992), does not resolve the issue here either. This Court explicitly declined to address whether Congress could amend the law for a single pending case. The statute there did not do that. And like *Wheeling Bridge*, the case concerned prospective relief and public rights—the ongoing management of federal forests.

Nor did *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), decide this issue. That case struck down a generally applicable statute that purported to reopen final judgments in securities cases. The Court's holding that Congress may not reopen final judgments, either generally or in specific cases, does not mean Congress can change the outcome of a single pending case.

II. Section 8772 also suffers from a second constitutional defect: It effectively dictates the outcome of this one case.

A. In *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), this Court struck down a statute that purported to prescribe rules of decision for the judicial branch. That holding was consistent with a long line of authority making clear that legislatures may not dictate the outcome of pending cases, any more than they may reopen final judgments.

B. Section 8772 effectively dictated the outcome here. The statute expressly recites that its purpose is "to *ensure* that Iran is held accountable for paying the judgments." 22 U.S.C. §8772(a)(2) (emphasis added). And the legislative record leaves no doubt that Congress knew the statute would have that effect.

Although §8772 purported to require two judicial determinations, the findings were makeweights. They amounted only to findings that the assets at issue were traceable to Iran rather than someone else. And by the time Congress enacted the statute, both findings were foregone conclusions.

III. Bank Markazi's sovereign status does not alter the foregoing analysis. That status was not the basis for the decision below and therefore need not and should not be addressed by this Court in the first instance.

Bank Markazi's sovereign status is irrelevant in any event. Although plaintiffs and the government urge that *sovereign immunity* was historically determined by the Executive Branch case by case, §8772 does far more than revoke immunity. It overrides *substantive* state property law under the Uniform Commercial Code as well as *substantive* federal law regarding juridical status. Besides, the Executive Branch's former practice of deciding immunity case by case does not mean *Congress* may also intervene in specific pending cases—particularly now that Congress has withdrawn sovereign immunity from Executive control and committed it to judicial determination under defined legal standards.

ARGUMENT

"The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers"—a system fraught with "abuses of legislative interference with the courts at the behest of private interests and factions." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219-221 (1995). They felt "a sharp necessity to separate the legislative from the judicial power." *Id.* at 221. Their response was Article III—an "'inseparable element of the constitutional system of checks and balances' that 'both defines the power and protects the in-

dependence of the Judicial Branch.'" *Stern* v. *Marshall*, 131 S. Ct. 2594, 2608 (2011).

The Constitution grants Congress broad legislative authority under Article I. But the power to decide individual cases and controversies belongs to the judiciary under Article III. Section 8772 cannot be reconciled with that allocation of authority. By its terms, § 8772 purports to create a new rule—displacing otherwise dispositive state and federal law—for a *single pending case*, identified by docket number in the U.S. Code. The provision has no effect on *any* other case. And it has no meaningful prospective effect either: It simply directs the court to ignore otherwise governing law and follow a different rule, in this one case, when deciding whether one party must turn over nearly $2 billion to other parties as compensation for past injuries. Such a provision is unprecedented in our Nation's history and crosses the line from making laws to deciding cases—a role Article III reserves to the courts.

More than a century ago, in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), this Court struck down a statute that purported to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146. Congress, the Court held, had "passed the limit which separates the legislative from the judicial power." *Id.* at 147. Whatever the scope of *Klein* and its progeny today, § 8772 goes far beyond constitutional bounds.

While Article III "safeguards the role of the Judicial Branch," *CFTC* v. *Schor*, 478 U.S. 833, 850 (1986), "[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed," *Metro. Wash. Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). "When struc-

ture fails, liberty is always in peril." *Pub. Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment). Section 8772 is a structural failure of unprecedented proportions.

I. SECTION 8772 VIOLATES THE SEPARATION OF POWERS BY PURPORTING TO CHANGE THE LAW SOLELY FOR A SINGLE PENDING CASE

Section 8772 is a radical departure from this Nation's traditions. It does not purport to change the law generally or for a class of circumstances. It has no meaningful prospective effect at all. Instead, § 8772 purports to alter the law for a single pending case concerning the payment of money from one party to others. Congress expressly denied the statute *any application whatsoever* beyond this one, specifically identified case.

Such "good for this case only" legislation is virtually unheard of in the history of the Republic—and with reason. The separation of powers presumes that the "law" has some existence independent from its application in a particular case. If Congress can simply commandeer the judiciary and dictate how courts must decide individual cases before them, Congress might as well take the bench and rule on cases by legislative decree. Our system of separated powers does not allow that intrusion on the judicial function. It is foreclosed by the Constitution's text and structure. It is foreclosed by historical practice. And it is foreclosed by common sense.

A. Section 8772 Usurps the Judicial Function of Deciding Individual Cases

1. The Constitution's text makes clear that the power to decide individual cases is a judicial rather than legislative function. Article III extends "[t]he judicial power" to particular categories of "cases" or "controversies." U.S.

Const. art. III, §2. The Framers chose those words carefully to distinguish the *judicial* power of deciding particular cases from the *legislative* power of enacting general pronouncements of law. See 1 Noah Webster, *An American Dictionary of the English Language* (1828) (defining "case" as "[a] cause or suit in court" and "controversy" as "a case in which opposing parties contend for their respective claims before a tribunal"); 2 *The Records of the Federal Convention of 1787*, at 430 (Farrand ed., 1911) (jurisdiction "limited to cases of a Judiciary nature").

That distinction between the power to enact *general* laws and the power to decide *specific* cases was well understood by the Framers. As Locke explained, one of the "Bounds * * * set to the Legislative Power" is that "[t]hey are to govern by promulgated establish'd Laws, *not to be varied in particular Cases*." John Locke, *Two Treatises of Government* bk. 2, § 142, at 295 (4th ed. 1713) (emphasis altered). Conversely, Tocqueville wrote that a defining "characteristic of judicial power" was "that it pronounces on *special cases*, and not upon general principles." Alexis de Tocqueville, *Democracy in America* 79 (Reeve trans., 1838) (emphasis added). *The Federalist* drew the same distinction, describing the judicial power as the "decision of * * * causes," *The Federalist No. 81*, at 481-482 (Hamilton) (Rossiter ed., 1961), and the legislative power as "prescrib[ing] the rules by which the duties and rights of every citizen are to be regulated," *The Federalist No. 78*, at 465 (Hamilton); see also *Address of the Council of Censors* (Feb. 14, 1786), in *Vermont State Papers* 531, 540 (Slade ed., 1823) ("The legislative body is, in truth, by no means competent to the determination of causes between party and party, nor was, by our Con-

stitution, or that of any other country who make pretences to freedom, ever considered so * * * ").

Justice Iredell made the same point in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), shortly after the Constitution's ratification. Describing the Connecticut legislature's "habit of exercising a general superintending power over its courts of law," he wrote that "[i]t may, indeed, appear strange to some of us, that in any form, there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions." *Id.* at 398. "The power * * * is judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority." *Ibid.* Chief Justice Marshall agreed twelve years later in *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810), writing that "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Id.* at 136.

That understanding persisted throughout the nineteenth century. "[T]hat which distinguishes a judicial from a legislative act," Cooley wrote, is that "the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 91 (1868). In a particularly apt passage, he added: "'That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be

enforced.'" *Ibid.*; see also *Report of the Sixth Annual Meeting of the American Bar Association* 14-15 (1883) (remarks of Charles C. Bonney) ("[T]he application of law to a state of facts, for the determination of a controversy, is a pure judicial function * * * "). That remains the common understanding today: "[J]udges handle individual cases; the legislature generalizes." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176 (1989).

That is not to say that every statute addressing a specific person or problem is unconstitutional. Congress has enacted private bills granting individual relief against the United States since the Framing, and laws that alter the prospective effects of a decree have long been deemed constitutional. See pp. 35-37, 40-41, *infra*. But Congress cannot simply pass a law requiring one party in a pending judicial proceeding to pay its opponents nearly $2 billion simply because that is the result Congress wants. If the distinction between law-making and case-deciding has any content, it prohibits Congress from "say[ing] that a court must award Jones $35,000." *Lindh* v. *Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997). That, however, is exactly what § 8772 does.

2. Section 8772 alters the rule for a single pending case concerning the payment of money for a past injury. Congress could not have made its intent to target this one case any clearer. Section 8772 expressly declares that it applies only to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. § 8772(b). It explicitly disclaims any broader impact:

The statute has no effect on "*any other action* against a terrorist party in *any proceedings other than [the] proceedings referred to.*" *Id.* §8772(c)(1) (emphasis added). The statute thus changes the law for this case alone.

Consequently, if other plaintiffs sought to execute against the same assets based on identical claims, their case would be subject to a completely different rule. Indeed, if plaintiffs themselves filed another action against the same assets on identical claims, that suit too would be treated differently. This one case enjoys special treatment only because plaintiffs' lawyers persuaded Congress to change the law solely for this one case. Such a statute—which has no existence or effect independent of its application in a single judicial proceeding—is simply not a "law" within the customary meaning of the term.

Section 8772's impact could not have been more dramatic. The statute eliminated every defense Bank Markazi had raised. Before §8772's enactment, state law precluded plaintiffs from seizing the assets at issue. Bank Markazi held its foreign exchange reserves in the form of security entitlements at UBAE in Italy. Pet. App. 2a; C.A. App. 1329-1332, 1602-1604. Plaintiffs could not reach those assets because they were beyond the court's territorial jurisdiction. See *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2257 (2014) (courts "generally lack authority in the first place to execute against property in other countries").

Plaintiffs therefore sought to seize Clearstream's corresponding security entitlements in New York. But state law prohibited that end-run: Under U.C.C. Article 8, "[t]he interest of a debtor in a security entitlement may be reached by a creditor *only* by legal process upon the securities intermediary *with whom the debtor's securities account is maintained*"—in this case, UBAE in Italy.

U.C.C. §8-112(c) (emphasis added). Creditors "cannot reach Debtor's interest by legal process" directed to other intermediaries further down the chain. U.C.C. §8-112 cmt. 3; see 7A Hawkland, *supra*, §8-112:01. That is why the district court originally ruled that, "[u]nder the plain meaning of NY UCC 8-112(c), Clearstream is not a proper garnishee." Pet. App. 126a. Because Clearstream's security entitlements were not Bank Markazi's property under the U.C.C., moreover, they also were not "assets of" Bank Markazi under TRIA and therefore could not be seized under that statute. See *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934, 937-941 (D.C. Cir. 2013).

Section 8772 simply overrode those principles for this one case. The statute allows the plaintiffs in this case to seize property "held in the United States for a foreign securities intermediary" that is "*equal in value* to a financial asset of Iran * * * that such foreign securities intermediary or a related intermediary holds abroad." 22 U.S.C. §8772(a)(1)(A), (C) (emphasis added). The statute expressly "preempt[s] any inconsistent provision of State law" such as the U.C.C. *Id.* §8772(a)(1). Applying that new, one-case-only regime, the district court allowed plaintiffs to satisfy their judgments against Iran by seizing Clearstream's assets in New York. Pet. App. 111a-113a. And to ensure the effectiveness of that decision, it granted Clearstream a discharge of any liability to Bank Markazi while enjoining Bank Markazi from pursuing any claims against it. *Id.* at 26a.

Congress did not stop there: It also rewrote substantive federal law. Under *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), plaintiffs could not generally seize Bank Markazi's assets to satisfy Iran's debts. Rather, as

a "juridical entit[y] distinct and independent from [its] sovereign," Bank Markazi had to be "treated as such." *Id.* at 626-627. But not for this case: Section 8772 expressly applies to property "equal in value to a financial asset of Iran, *including an asset of the central bank or monetary authority of the Government of Iran.*" 22 U.S.C. §8772(a)(1)(C) (emphasis added); see also *id.* §8772(d)(3). The statute thus overrode federal law governing juridical status and respect for the corporate form.

Section 8772 also rewrote the law of sovereign immunity. Under the FSIA, "property * * * of a foreign central bank or monetary authority held for its own account" is immune from execution. 28 U.S.C. §1611(b)(1). For this one case, however, §8772 permits execution "notwithstanding * * * any provision of law relating to sovereign immunity." 22 U.S.C. §8772(a)(1).

Finally, §8772 abrogates solemn treaty obligations. The Treaty of Amity prohibits unreasonable or discriminatory treatment of Iranian companies and requires that their juridical status be respected. See Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, arts. III.1, IV.1, Aug. 15, 1955, 8 U.S.T. 899, 902-903. But §8772 abrogates Bank Markazi's separate status and subjects it to uniquely oppressive treatment precisely because it is Iranian. 22 U.S.C. §8772(a)(1)-(2).

By systematically eliminating every defense Bank Markazi had raised for this one case alone, Congress changed the outcome as surely as if it had presided over the case and decided it in plaintiffs' favor. That result is antithetical to the rule of law that the separation of powers is designed to protect.

B. Section 8772 Defies the Nation's History and Traditions

The Framers' decision to separate the judicial and legislative functions was no accident. It was a deliberate response to "abuses of legislative interference with the courts at the behest of private interests and factions." *Plaut*, 514 U.S. at 220-221. Section 8772 is a paradigmatic example of those abuses.

1. The Framers were well-acquainted with those evils in England. During the Interregnum, "Parliament gave a Council of State powers to arrest, interrogate, and imprison." Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 Const. Comment. 359, 377 (1991). Parliament sometimes presided over specific cases—most infamously over bills of attainder, in which Parliament would hear evidence on criminal charges and then vote on the guilt of the accused. See, *e.g.*, *Fenwick's Case*, 13 How. St. Tr. 537 (1696). Legislative interference with the ordinary judicial process was a recurring source of complaint. See, *e.g.*, John Lilburne, *A Defiance to Tyrants* 5 (1648) (demanding that Parliament not "interrupt the ordinary course of justice in the several Courts" or "intermeddle in cases of private interest"); *Leveller Manifestoes of the Puritan Revolution* 263, 266 (Wolfe ed., 1944) (reprinting Lilburne's 1648 petition demanding that "[n]o particular cause, whether Criminal or other, which comes under the Cognizance of the ordinary Courts of Justice, may be determined by this House, or any Committee thereof").

The colonies suffered through similar excesses. Colonial legislatures often passed special legislation that "modif[ied] the position of named parties before the law." Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 Mich. L. Rev. 247, 258 (1914);

e.g., Act of Nov. 3, 1784, 5 *Laws of New Hampshire* 21 (Metcalf ed., 1916) (extending limitations period for pending case); Act of Feb. 5, 1789, 5 *Laws of New Hampshire*, *supra*, at 395 (annulling deeds). Legislatures so often "extend[ed] their deliberations to the cases of individuals" that many "consider[ed] an application to the legislature, as a shorter and more certain mode of obtaining relief from hardships and losses, than the usual process of law." *A Report of the Committee of the Council of Censors* 6 (Phila. 1784). Legislatures sometimes even conducted "the actual trial of civil or criminal cases." Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* 15 (1943); see *id.* at 14-60 (collecting cases); *Judicial Action by the Provincial Legislature of Massachusetts*, 15 Harv. L. Rev. 208 (1901) (same).

The Framers witnessed "many instances" where legislatures "decided rights which should have been left to judicial controversy." Thomas Jefferson, *Notes on the State of Virginia* 126 (Shuffelton ed., 1999). Special laws were "pushed through the legislatures by unscrupulous men" to serve private ends. Charles Binney, *Restrictions upon Local and Special Legislation in State Constitutions* 6 (1894). Legislative "[i]nterferences with [private rights] were evils which had more perhaps than anything else, produced th[e] [constitutional] convention." 1 Farrand, *supra*, at 134 (Madison).

2. The Framers thus fully appreciated that "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" *The Federalist No. 78*, at 466 (Hamilton) (quoting 1 Baron de Montesquieu, *The Spirit of Laws* 181 (Nugent trans., 10th ed. 1773)). They separated the legislative and judicial powers to prevent legislative interference with specific cases.

Early courts repeatedly enforced that design, striking down legislation far less intrusive than the statute here.

In *Lewis* v. *Webb*, 3 Me. (3 Greenl.) 326 (1825), for example, certain bondsmen belatedly discovered they were liable on a debt, and persuaded the legislature to enact a law extending their time to appeal. Maine's highest court invalidated the law as an invasion of the judicial power. "It is one of the striking and peculiar features of judicial power," the court held, "that it is displayed in the decision of controversies between contending parties * * * " *Id.* at 332. "[I]t can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law, in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation." *Id.* at 336.

Similarly, in *Merrill* v. *Sherburne*, 1 N.H. 199 (1818), the losing party to a lawsuit petitioned the legislature for a special act permitting him to refile his claims. The legislature obliged, but the court held the statute unconstitutional because it targeted a specific case: "It is the province of judicial power * * * to decide private disputes 'between or concerning persons,'" the court explained, and "of legislative power to regulate publick concerns and to 'make laws' for the benefit and welfare of the state." *Id.* at 204.

In *Baggs's Appeal*, 43 Pa. 512 (1862), certain parties missed the deadline to file claims against an estate but convinced the legislature to extend the deadline for their case alone. The court struck down the statute. "Properly speaking," it held, "all *laws* are rules for *classes* of cases, and never for a particular case or instance. That can be only a rescript, judgment, or decree that decides a par-

ticular case, or any part of it, and it is naturally and essentially the result of judicial and not of legislative functions * * * * " *Id.* at 516.

Many other cases reached similar results. See, *e.g.*, *Tate's Ex'rs* v. *Bell*, 12 Tenn. (4 Yer.) 202, 207 (1833) (invalidating statute that operated, "not as a general provision, but to reach particular individuals"); *Jones' Heirs* v. *Perry*, 18 Tenn. (10 Yer.) 59, 69 (1836) (striking down act that directed sale of specific private lands because it lacked "permanent, uniform, and universal character" and instead amounted to a "judicial decree"); *Reiser* v. *William Tell Saving Fund Ass'n*, 39 Pa. 137, 146-147 (1861) (invalidating act that exempted certain associations from general usury laws). All those decisions reflected the settled understanding that statutes changing the law solely for one case represent impermissible legislative exercise of the judicial power.[3]

3. Longstanding congressional practice reflects that same understanding. If Congress thought it had the power to change the law for a single pending case between other parties over the payment of money, it surely would have exercised that authority before now. Congress's failure to invoke such authority over the past two centuries is "reason to believe that the power was thought not to exist." *Printz* v. *United States*, 521 U.S. 898, 905 (1997). Such "prolonged reticence would be

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[3] Many States went further and adopted express constitutional prohibitions on special legislation. See Binney, *supra*, at 130-131 (counting 39 States by 1894). Those provisions swept far beyond the issues at stake here by prohibiting special legislation in general, not just statutes changing the law for one judicial proceeding. But the provisions rested at least in part on separation-of-powers concerns. See *id.* at 3-4 (noting "judicial" aspect of special legislation).

amazing if such interference were not understood to be constitutionally proscribed." *Plaut*, 514 U.S. at 230.

Federal cases challenging legislation as improperly directing the outcome of a specific case have largely arisen only in the past few decades. Most involved public rights—claims for relief against the United States that Congress has historically been permitted to resolve outside an Article III forum. See pp. 35-37, *infra*.[4] The handful of others concerned *generally applicable* legislation that was merely alleged to have been enacted for the *purpose* of affecting specific litigation.[5] Statutes like §8772 that *explicitly single out* a pending case between other parties are anomalous. Indeed, §8772 is such an extreme departure from the separation of powers that it

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[4] See *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 402-405 (1980) (waiver of government's res judicata defense); *Pope* v. *United States*, 323 U.S. 1, 8-10 (1944) (payment of government debt); *Ecology Ctr.* v. *Castaneda*, 426 F.3d 1144, 1148-1150 (9th Cir. 2005) (timber harvesting); *Shawnee Tribe* v. *United States*, 423 F.3d 1204, 1216-1218 & n.13 (10th Cir. 2005) (disposition of government property); *City of Chicago* v. *U.S. Dep't of Treasury*, 423 F.3d 777, 783-784 (7th Cir. 2005) (FOIA); *Biodiversity Assocs.* v. *Cables*, 357 F.3d 1152, 1170-1171 (10th Cir. 2004) (timber harvesting), cert. denied, 543 U.S. 817 (2004); *Nat'l Coal. To Save Our Mall* v. *Norton*, 269 F.3d 1092, 1095-1097 (D.C. Cir. 2001) (construction on federal land), cert. denied, 537 U.S. 813 (2002); *Mt. Graham Coal.* v. *Thomas*, 89 F.3d 554, 557-558 (9th Cir. 1996) (similar).

[5] See *Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1139-1140 (9th Cir. 2009) (upholding statute preempting suits against firearm manufacturers and dealers because it "applied to all cases" even if "members of Congress wanted to preempt *this* pending case"), cert. denied, 560 U.S. 924 (2010); *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 395-396 (2d Cir. 2008) (similar), cert. denied, 556 U.S. 1104 (2009); *Cook Inlet Treaty Tribes* v. *Shalala*, 166 F.3d 986, 990-991 (9th Cir. 1999) (upholding general statute despite allegation that it was "directed at this litigation"); *Maher* v. *Strachan Shipping Co.*, 68 F.3d 951, 957 & n.8 (5th Cir. 1995) (similar).

would be condemned by legal systems far less committed to the principle than our own.[6]

Perhaps the most salient example of intervention dates not to 1805, or to 1905, but to 2005. During a protracted dispute over the withdrawal of life support from a comatose Terri Schiavo, Congress enacted a law granting a federal court jurisdiction to hear claims on her behalf. See An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, §1, 119 Stat. 15, 15 (2005). Congress directed the court to decide the case "de novo," without regard to prior state-court rulings or otherwise applicable exhaustion or abstention bars. *Id.* §2.

Members of Congress vociferously objected to that disregard of "what the writers of the Constitution [meant] when they said separation of powers." 151 Cong. Rec. 5455 (Mar. 20, 2005) (Rep. Frank). "Congress deals with broad policy," while "[i]ndividual adjudications are made by judges." *Ibid.*; see also *id.* at 5457 (Rep. Davis) ("Congress as a judge and a jury" is "a threat to our democracy"); *id.* at 5468 (Rep. Conyers) ("By passing legislation which takes sides in an ongoing legal dispute, we will be casting aside the principle of the separation of powers. We will be abandoning our role as a serious legislative branch * * * ").

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[6] See, *e.g.*, *Zielinski* v. *France*, App. No. 24846/94, 1999-VII Eur. Ct. H.R. 95, 120-121 ¶57 (1999) ("[T]he rule of law and the notion of fair trial * * * preclude any interference by the legislature—other than on compelling grounds of the general interest—with the administration of justice designed to influence the judicial determination of a dispute."); *Stran Greek Refineries* v. *Greece*, App. No. 13427/87, 301-B Eur. Ct. H.R. (ser. A) 65, 82 ¶¶49-50 (1994) (similar); Anna Jasiak, *Changing the Rules Mid-Game: Legislative Interference in Specific Pending Cases*, 4 Vienna J. Int'l Const. L. 20 (2010) (comparing European and American standards).

Ultimately, the courts assumed the statute's constitutionality and denied relief on other grounds. See *Schiavo ex rel. Schindler* v. *Schiavo*, 357 F Supp. 2d 1378, 1382-1383 (M.D. Fla. 2005), aff'd, 403 F.3d 1223 (11th Cir. 2005). Even then, Judge Birch urged that the statute "invades the province of the judiciary and violates the separation of powers." *Schiavo ex rel. Schindler* v. *Schiavo*, 404 F.3d 1270, 1273-1274 (11th Cir. 2005) (Birch, J., concurring in denial of rehearing).

While the Terri Schiavo statute was a marked departure from Congress's traditional role, it pales in comparison to §8772. Section 8772 does not merely alter the legal standards for granting or withholding prospective relief. It purports to change the law in a dispute over whether one party must pay its opponents almost $2 billion in compensation for past injuries. That is an unprecedented legislative exercise of judicial power.

C. Section 8772 Has No Support in This Court's Precedents

This Court's decisions have long allowed Congress to enact laws with meaningful prospective effects, even if they affect the outcome of pending cases. The Court has also recognized Congress's broad authority over traditional public rights—claims against the federal government that Congress need not even commit to an Article III forum. See *Stern*, 131 S. Ct. at 2611-2615. None of those cases comes close to holding that Congress can enact a statute that alters the law solely for a single pending case between other parties over the payment of money.

1. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), highlights the unprecedented nature of this legislation. In that case, this Court had previously ruled that a particular bridge was an ob-

struction to navigation and ordered its demolition. *Id.* at 429. In the wake of that decision, Congress enacted a statute making the bridge a federal post-road to prevent its removal. *Ibid.* The Court upheld the statute. "So far * * * as this bridge created an obstruction to the free navigation of the river," it held, that circumstance was "modified by this subsequent legislation." *Id.* at 430.

That statute bears no resemblance to §8772. The statute in *Wheeling Bridge* did not change the law solely for one case. Congress made the bridge a federal post-road for all purposes and all cases, foreclosing any action to require its removal by any party at any time. *Wheeling Bridge* might come closer to this case if Congress had passed a statute deeming the bridge a federal post-road solely for one pending judicial proceeding. But it did not.

Critical to the Court's decision, moreover, was the nature of the relief. The earlier decree directing removal of the bridge was "executory, a continuing decree." 59 U.S. (18 How.) at 431. If the right to free navigation was "modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced." *Id.* at 431-432. The case thus involved Congress's authority to alter the law in a way that affected the propriety of a prospective decree—not a claim for money damages. The case also concerned public rights—an area where Article III courts traditionally have not exercised exclusive authority. "[I]nterference with the free navigation of the river," the Court explained, "constituted an obstruction of a public right secured by acts of congress." *Id.* at 431.

The Court specifically contrasted the dispute with a common-law claim for damages. "[I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages," it explained, "the

right to these would have passed beyond the reach of the power of congress." 59 U.S. (18 How.) at 431; see also *The Clinton Bridge*, 77 U.S. (10 Wall.) 454, 463 (1870) ("very different considerations would have arisen" if the "action had been at common law for damages"); *Miller* v. *French*, 530 U.S. 327, 345-347 (2000) (similar).

That contrast is fatal here. Section 8772 does not concern navigation rights in federal waters or other public rights. Nor does it alter an entitlement to prospective relief. It creates a new rule for a single pending case designed to ensure that one party pays its opponents nearly $2 billion for past injuries. Nothing in *Wheeling Bridge* supports such a statute.

2. *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), is similarly inapposite. In that case, Congress enacted a statute in response to two lawsuits alleging that the government's plans to allow timber harvesting on federal lands violated environmental laws. *Id.* at 432. The statute set forth new rules to govern the validity of the logging plans and provided that "management of areas according to [the new rules] * * * is adequate consideration" for purposes of satisfying the relevant environmental laws. Pub. L. No. 101-121, §318(b)(6)(A), 103 Stat. 701, 747 (1989).

Far from holding that case-specific legislation satisfies the separation of powers, this Court expressly declined to reach the issue. The Ninth Circuit had "held that [the statute] was unconstitutional under *Klein* because it directed decisions in pending cases without amending any law." 503 U.S. at 441. This Court concluded, however, that the statute "*did* amend applicable law." *Ibid.* The Court thus observed that it "need not consider whether [the court of appeals'] reading of *Klein* is correct." *Ibid.* Because the Ninth Circuit's decision was flawed even on

its own terms, the Court reversed that narrow ruling without "address[ing] any broad question of Article III jurisprudence." *Ibid.*

The Court noted the argument, made in an amicus brief, that "even a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases." 503 U.S. at 441. But "[t]his alternative theory was neither raised below nor squarely considered by the Court of Appeals, nor was it advanced by respondents in this Court." *Ibid.* The Court therefore "decline[d] to address it." *Ibid.* *Robertson* thus did not hold that statutes purporting to change the law solely for a single pending case are constitutional. It expressly declined to reach that issue.

As the Court explained, moreover, the statute in question did not even present that issue. The plaintiffs complained that the statute "made reference to pending cases identified by name and caption number." 503 U.S. at 440. But the Court responded that "[t]he reference to [the cases] * * * served only to identify the five 'statutory requirements that are the basis for' those cases." *Ibid.* In other words, the statute provided that compliance with the new rules was sufficient to comply with *the five statutory requirements at issue in* those two cases, not that the statute *applied* only to those two cases. See Pub. L. No. 101-121, §318(b)(6)(A), 103 Stat. at 747 (providing that "management of areas according to [the new rules] * * * is adequate consideration for the purpose of meeting the statutory requirements that are the basis for [the two cases identified by docket number]").

The statute thus would have applied equally to *any other lawsuit by any other plaintiff* challenging the logging on the basis of those five statutory provisions. That

is the opposite of the statute here, which expressly disclaims any effect on "any other action * * * in any [other] proceedings." 22 U.S.C. §8772(c)(1).

Finally, although not the basis for the Court's decision, *Robertson* fell squarely within the traditional *Wheeling Bridge* exceptions. The case involved suits to enjoin logging on federal lands under federal environmental statutes. It thus involved prospective relief against the government concerning traditional public rights—not tort claims between other parties seeking billions of dollars of money damages.

3. Nor does *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), support §8772's constitutionality. That case involved a statute purporting to revive securities lawsuits dismissed under this Court's statute-of-limitations decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991). The statute did not target any particular case. It applied generally to "[a]ny private civil action" dismissed under *Lampf*. Pub. L. No. 102-242, sec. 476, §27A(b), 105 Stat. 2236, 2387 (1991).

This Court held that the statute violated the separation of powers by "requir[ing] federal courts to reopen final judgments." *Plaut*, 514 U.S. at 240. Article III, the Court held, grants the judiciary "the power, not merely to rule on cases, but to *decide* them." *Id.* at 218-219. That violation, the Court added, did not depend on how many judgments Congress reopened: The violation "consists *not* of the Legislature's acting in a particularized and hence * * * nonlegislative fashion; but rather of the Legislature's nullifying prior, authoritative judicial action." *Id.* at 239 (footnote omitted). "It makes no difference whatever to that separation-of-powers violation that it is in gross rather than particularized * * * " *Ibid.*

That holding does not support what Congress did here. The statute in *Plaut* was unconstitutional because it reopened final judgments. For "*that* separation-of-powers violation," it made no difference whether the violation was "in gross rather than particularized." 514 U.S. at 239 (emphasis added). That does not mean the specificity of a statute is irrelevant when Congress tries to legislate the outcome of a specific pending case.

In a footnote, the Court deemed it "questionable" whether "there is something wrong with particularized legislative action," noting that "[e]ven laws that impose a duty or liability upon a single individual or firm are not on that account invalid." 514 U.S. at 239 n.9. But §8772 does not merely impose a duty or liability upon a "single individual or firm." It changes the law for a single *case*. The core judicial function is to decide particular cases or controversies. When Congress manipulates the law governing a single pending *case*, it infringes that power.

The tradition of "[p]rivate bills in Congress" that *Plaut* identified only underscores the contrast between §8772 and historical practices. 514 U.S. at 239 n.9. The enactment of a bill for private relief did not change the law for a specific pending *case*. Of the 563 private bills Congress enacted between 1789 and 1819, not a *single one* purported to change the law for a pending judicial proceeding. See 6 Stat. 1-235 (1789-1819). Only a handful referred to judicial proceedings at all, and those simply paid or indemnified judgments,[7] or released the

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[7] See Act of Apr. 14, 1802, ch. 27, 6 Stat. 47 (paying judgment against officer); Act of Jan. 31, 1805, ch. 12, 6 Stat. 56 (paying admiralty judgment); Act of Jan. 17, 1807, ch. 4, 6 Stat. 63 (paying admiralty judgment); Act of Feb. 2, 1813, ch. 19, 6 Stat. 116 (paying judgment against officer); Act of Apr. 26, 1816, ch. 90, 6 Stat. 166 (paying interest on award); Act of Apr. 29, 1816, ch. 157, 6 Stat. 175 (indemnifying

government's own claims.[8]

Private bills, moreover, invariably involved matters such as payment of compensation for government service, payment of claims against the government, forgiveness of debts owed to the government, or disposition of government property. See, *e.g.*, Act of Sept. 29, 1789, ch. 26, 6 Stat. 1 (paying compensation for government service); Act of July 1, 1790, ch. 24, 6 Stat. 3 (forgiving penalty for neglecting to transport the mail). Those are paradigmatic *public rights*. If Congress could enact a bill to alter the outcome of a pending case between other parties, it surely would have done so. It did not.

Plaut also referred to this Court's ruling in *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), that "Congress may legislate 'a legitimate class of one.'" 514 U.S. at 239 n.9. *Nixon* upheld a statute providing for custody of President Nixon's tape recordings. 433 U.S. at 433-434, 471-472. The statute did not purport to change the tapes' status solely for one pending *case*.

Nor does the mere existence of the Bill of Attainder Clause imply that any legislation not running afoul of that clause is automatically constitutional. *Plaut*, 514 U.S. at 239 n.9 (citing U.S. Const. art. I, § 9). The Bill of Attainder Clause targeted one particularly notorious

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parties); Resolution No. 2 of Feb. 15, 1816, 6 Stat. 180 (indemnifying parties); Act of Apr. 11, 1818, ch. 50, 6 Stat. 206 (paying judgments); Act of Apr. 18, 1818, ch. 72, 6 Stat. 208 (paying judgment); cf. Act of Mar. 2, 1819, ch. 53, 6 Stat. 228 (consenting to bill in equity against the government).

[8] See Act of Apr. 29, 1802, ch. 34, 6 Stat. 47 (discontinuing suit brought by government); Act of Apr. 20, 1816, ch. 59, 6 Stat. 162 (releasing defendant from judgment obtained by government); Act of Apr. 27, 1816, ch. 108, 6 Stat. 169 (conditionally releasing claims brought by government).

abuse, but it reflected broader separation-of-powers concerns. See *United States* v. *Brown*, 381 U.S. 437, 442 (1965) (clause was "an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature"); 3 Joseph Story, *Commentaries on the Constitution of the United States* §1338, at 210 (1833); *Leveller Manifestoes*, *supra*, at 266. It cannot be that, by prohibiting that one abuse, the Constitution licenses Congress to exercise whatever other judicial powers it wants so long as it does not actually attaint anyone. Congress obviously could not appoint a subcommittee to adjudicate common-law breach of contract or personal injury suits between private parties so long as it operated only a civil and not a criminal docket.

Plaut's footnote thus stands only for the modest and uncontroversial proposition that particularized legislation *in general* is "not on that account invalid." 514 U.S. at 239 n.9. It does not mean that statutes changing the law solely for a specific pending *case* are constitutional—much less when Congress seeks to force one party to pay other parties billions of dollars for past injuries. Nothing in *Plaut* or any other decision of this Court supports such extraordinary legislation.

II. Section 8772 Effectively Dictates The Outcome Of A Specific Pending Case

Section 8772 also suffers from a further constitutional defect. It does not merely purport to change the law for one case. It also effectively determined the case's outcome. Under Article III, courts—not Congress—decide individual cases. Congress usurps that function when, in the guise of legislating, it enacts a case-specific rule that effectively dictates the outcome.

A. Congress May Not Direct the Outcome of Specific Cases

1. Over a century ago, *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), held that Congress may not dictate the outcome of a pending case. In that case, Congress had enacted a statute designed to prevent pardoned Confederate sympathizers from prevailing in suits against the government. An earlier statute had authorized the Secretary of the Treasury to seize and sell abandoned or captured property during the war. Act of Mar. 3, 1863, ch. 120, §§1-2, 12 Stat. 820, 820. The owner could sue in the court of claims after the war to recover the proceeds, but had to prove his loyalty to the United States. *Id.* §3.

In *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531 (1870), this Court held that acts of disloyalty would be disregarded if the claimant had been pardoned. *Id.* at 541-543. A few months later, Congress included a rider in an appropriations bill stating that a pardon was not "admissible in evidence on the part of any claimant." Act of July 12, 1870, ch. 251, 16 Stat. 230, 235. To the contrary, if the pardon recited acts of disloyalty that the recipient had not denied upon being pardoned, the statute required that it be deemed "conclusive evidence that such person did take part in and give aid and comfort to the late rebellion." *Ibid.*

This Court held the statute unconstitutional. The provision purported to dictate the outcome of pending cases "founded solely on the application of a rule of decision * * * prescribed by Congress." *Klein*, 80 U.S. (13 Wall.) at 146. That was impermissible: "[T]he legislature," the Court held, may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Ibid.* By seeking to dictate the outcome in

pending cases, Congress had "passed the limit which separates the legislative from the judicial power." *Id.* at 147.

2. *Klein*'s holding was no innovation. Legislative attempts to direct the outcome of pending cases have long been deemed as objectionable as efforts to reopen final judgments. The chronicles of legislative abuses leading up to the Constitution's adoption are replete with examples. See pp. 29-30, *supra* (describing special legislation passed to "modif[y] the position of named parties before the law" as well as actual legislative trial of civil and criminal cases).

Early state courts condemned such legislation. In *Holden* v. *James*, 11 Mass. (10 Tyng) 396 (1814), the court held that "to prescribe to the courts of justice the judgment which the laws of the land would require them to render on the facts disclosed in this case * * * would be an exercise of judicial power by the legislative department." *Id.* at 402. And in *O'Conner* v. *Warner*, 4 Watts & Serg. 223 (Pa. 1842), the court held that "a legislative direction to perform a judicial function in a particular way, would be a direct violation of the constitution." *Id.* at 227; see also *Reiser*, 39 Pa. at 145 (refusing to decide case "according to the direction of the legislature").

Cooley wrote that the separation of powers prohibits legislatures, not merely from "setting aside * * * judgments" or "compelling [courts] to grant new trials," but also from interfering with pending cases by "directing what particular steps shall be taken in the progress of a judicial inquiry." Cooley, *supra*, at 95. Sutherland agreed: The legislature may not "interfere by subsequent acts with final judgments of the courts," nor may it "direct how *existing* cases or controversies shall be decided." J.G. Sutherland, *Statutes and Statutory Construction* 9-10 (1891) (emphasis added). The separation

of powers thus prohibits Congress from directing the outcome of a case—especially for one case and one case alone.

B. Section 8772 Effectively Dictated the Outcome of This Case

Section 8772 violates those principles. It effectively directed the court to transfer almost $2 billion in assets from one party to others in a private monetary dispute. And while the statute formally conditioned that outcome on two judicial "determinations," both were make-weights. The statute is thus even more constitutionally offensive than the one this Court struck down in *Klein*, which at least had the virtue of establishing a rule for a class of cases. Section 8772 effectively directs the outcome in a single pending case.

1. Section 8772 states its objective clearly: "to *ensure* that Iran is held accountable for paying the judgments." 22 U.S.C. §8772(a)(2) (emphasis added). That statutory text leaves nothing to the imagination about Congress's intent.

If any doubt remained, the legislative record erases it. To avoid any "ambiguity about [the bill's] intent," Senator Menendez—the act's sponsor—stated on the Senate floor that he "wanted to be sure that there was understanding on the record that Iran * * * *should not be able to avoid having its assets attached.*" 158 Cong. Rec. S3321 (May 21, 2012) (emphasis added). He reiterated that objective in multiple press releases. See *Menendez Hails Banking Committee Passage of Iran Sanctions Legislation* (Feb. 2, 2012) (legislation "makes it so that [plaintiffs] *will be able to attach* two billion in Iranian Central Bank assets being held at a New York Bank" (emphasis added)); *ibid.* (bill "will finally allow [plaintiffs] to enforce the judgment against Iran using Iranian assets

being held at Citibank in NY"); *Menendez Hails Passage of Iran Sanctions Legislation* (May 21, 2012) (bill "[m]akes available for attachment frozen assets of Iran to pay judgments").

The Senate Banking Committee Chairman concurred: The legislation "enable[d] attachment of assets in which the government of Iran has an interest, to satisfy certain terror-related judgments." 158 Cong. Rec. S3318 (May 21, 2012). The House sponsor similarly explained that the statute "change[d] a specific part of Federal law to allow assets seized from the Iranian Government to be allocated to [plaintiffs]." 158 Cong. Rec. H5569 (Aug. 1, 2012). "It is time that Iran is held accountable," he stated, and the statute would "offer [plaintiffs] the justice that they have long been denied." *Ibid.*

Indeed, §8772 was drafted by one of plaintiffs' counsel and pushed through Congress by a lobbyist working with one of their law firms. See Julie Triedman, *Can U.S. Lawyers Make Iran Pay for 1983 Bombing?*, Am. Law., Oct. 28, 2013. Legislation drafted by one party that directs the court to grant victory to that party in a pending case might be unexceptional in a country lacking commitment to the rule of law. But it defies our Nation's settled traditions.

2. While §8772 purports to require two judicial "determinations," both are makeweights that belittle the judicial role. Plaintiffs may execute if the court determines that (1) "Iran holds equitable title to, or the beneficial interest in, the assets"; and (2) "no other person possesses a constitutionally protected interest in the assets." 22 U.S.C. §8772(a)(2). The statute thus required the court to find only that the assets were traceable to Iran rather than someone else. It effectively declared that Iran loses so long as only Iran loses. If Article III pre-

vents Congress from "say[ing] that a court must award Jones $35,000," *Lindh*, 96 F.3d at 872, it surely prevents Congress from awarding $35,000 conditioned only on a finding that the $35,000 belongs to the defendant and not someone else.

The findings, moreover, were foregone conclusions. There was never any dispute that Bank Markazi had a "beneficial interest" in the assets. Bank Markazi has acknowledged that fact throughout this litigation—that is why it has been litigating the case. See Pet. App. 2a ("Bank Markazi concedes that * * * it has at least a 'beneficial interest' in the assets at issue."); *id.* at 113a (cataloguing admissions). Indeed, plaintiffs first learned of the assets in June 2008 when the Treasury Department's Office of Foreign Assets Control advised them that an Iranian government entity had an interest in the assets. See Triedman, *supra*; C.A. App. 1386. And by the time Congress enacted §8772, the President had blocked the assets precisely because Bank Markazi had an "interest[] in [the] property." Executive Order No. 13,599, 77 Fed. Reg. 6659, 6659 (Feb. 5, 2012).

Similarly, there was never any genuine dispute over whether any *other* person had a cognizable interest in the assets. By the time Congress enacted §8772, Citibank had filed its interpleader complaint disclaiming any interest. See Pet. App. 54a; C.A. App. 1362. The only remaining candidates were UBAE and Clearstream. But §8772 *expressly excluded* their interests. In determining whether another party holds "equitable title to, or a beneficial interest in, the assets," the statute directs the court to *ignore* any "custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran." 22 U.S.C. §8772(a)(2)(A). The effect (and obvious purpose) of that

provision was to exclude the interests of UBAE and Clearstream—the only other parties with arguable claims. Congress thus knew full well what impact §8772 would have on the outcome of this case.[9]

3. The Second Circuit acknowledged Bank Markazi's argument that §8772 "effectively compels only one possible outcome, as Iran's beneficial interest in the assets had been established by the time Congress enacted §8772." Pet. App. 10a. Far from rejecting that contention, the Second Circuit embraced it. "[I]t would be unusual," the court declared, "for there to be more than one likely outcome when Congress changes the law for a pending case with a developed factual record." *Ibid.* The court thus conceded that "there may be little functional difference between §8772 and a hypothetical statute directing the courts to find that the assets at issue in this case are subject to attachment under existing law." *Ibid.* But the court upheld the statute nonetheless. Congress, it held, may change the law for a pending case "even when the result under the revised law is clear." *Id.* at 8a.[10]

The court of appeals reasoned that, under *Robertson*, Congress can direct the outcome of a case so long as it

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[9] Moreover, to the extent a third party had a "constitutionally protected interest in the assets," 22 U.S.C. §8772(a)(2), a court would be required to consider the claim even without a statutory requirement. The statute's superfluous exception for constitutional claims underscores how little §8772 actually left to judicial determination.

[10] The *district court* asserted that the statute left "plenty for [it] to adjudicate." Pet. App. 115a. But that claim is hard to square with the court's analysis, which occupied only two paragraphs and largely recited various admissions about the assets' status. See *id.* at 111a-113a. In any event, the *court of appeals* did not rely on that assertion, much less agree with it. And this Court reviews the court of appeals' judgment.

"changes the law applicable to th[e] case" rather than "compel[ling] judicial findings under old law." Pet. App. 9a. But that holding misreads *Robertson*. See pp. 37-38, *supra*. The *court of appeals* in *Robertson* held that the constitutionality of a statute turned on whether Congress "directed decisions in pending cases without amending any law." 503 U.S. at 441. But this Court *refused to consider* "whether this reading of *Klein* is correct." *Ibid.* Moreover, the statute in *Robertson* did not dictate the outcome. It "expressly reserved judgment upon 'the legal and factual adequacy' of the administrative documents" and "expressly provided for *judicial* determination of the lawfulness of * * * sales." *Id.* at 438-439.

This Court's later cases do not adopt that standard either. In *Plaut*, this Court mentioned *Klein* in three sentences of dicta explaining why *Klein* involved a different separation-of-powers question. 514 U.S. at 218. The Court stated that "later decisions have made clear that [*Klein*'s] prohibition does not take hold when Congress 'amend[s] applicable law.'" *Ibid.* But the only authority the Court cited for that point was the passage in *Robertson* where the Court *declined to address* that issue. *Ibid.* (citing 503 U.S. at 441). *Plaut* cannot fairly be read as deciding this question.

Nor can *Miller* v. *French*, 530 U.S. 327 (2000). That case involved a generally applicable statute that automatically stayed prison reform orders if the court did not decide a motion to terminate the order within 30 days. *Id.* at 333-334. The prisoners challenging the statute "concede[d]" that the provision would be valid under *Klein* if it amended applicable law, and the Court—accepting that concession—held that the statute did just that. *Id.* at 349 (citing *Plaut*, 514 U.S. at 218).

In short, none of this Court's cases holds that a statute that compels the outcome in a case—especially a single case specifically identified in statutory text—is constitutional so long as the statute amends the law. *Klein* certainly did not turn on any such formalism. Although the Court struck down the statute there because it prescribed "rules of decision" for pending cases, 80 U.S. (13 Wall.) at 146, the Court never suggested it was using that term in contradistinction to a statutory amendment. And the Court never explained what made the legislation at issue anything other than what it purported to be: a new law. Act of July 12, 1870, ch. 251, 16 Stat. at 235.

The distinction also makes no sense. Practically any congressional enactment can be described as "amending the law" in some sense. The distinction is thus at worst incoherent and at best a drafting rule that requires Congress to dictate outcomes by drafting statutes a particular way. The Framers intended the separation of powers to be a meaningful bulwark against legislative interference—not a rule of draftsmanship.

III. Bank Markazi's Sovereign Status Is Irrelevant

Seeking to avoid this Court's review, plaintiffs and the government previously argued that, whatever the separation-of-powers rule for other cases, this case is different because it involves a foreign sovereign. Br. in Opp. 23-25; U.S. Cert. Br. 18-19. That argument is both irrelevant and wrong.

A. Bank Markazi's sovereign status played no role in the court of appeals' decision below. That court decided the case based on general separation-of-powers principles, not a special rule for foreign sovereigns. See Pet. App. 7a-10a. This Court thus need not consider Bank Markazi's sovereign status. Any special rule for foreign

sovereigns, if properly preserved, would at most be an issue for remand.

This Court, moreover, is "'a court of review, not of first view.'" *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014). Neither the court below nor any other court of appeals has addressed whether Article III applies differently to claims against foreign sovereigns. This Court should follow its usual practice and refrain from pronouncing on that issue without the considered views of the lower courts.

B. In any event, Bank Markazi's sovereign status in no way mitigates the constitutional violation. Plaintiffs and the government contend that ordinary separation-of-powers principles should not apply because, in the past, *sovereign immunity* was decided on a case-by-case basis by the Executive Branch. Br. in Opp. 23-25; U.S. Cert. Br. 18-19. That argument fails for multiple reasons.

1. For one thing, §8772 goes far beyond revoking sovereign immunity. The statute preempts *state property law* under the Uniform Commercial Code as well as the federal substantive law of juridical status.

As explained above, New York law ordinarily would have precluded seizure of the assets at issue to satisfy Bank Markazi's obligations. See pp. 26-27, *supra*. Plaintiffs were permitted to execute only because §8772 "preempt[ed] any inconsistent provision of State law." 22 U.S.C. §8772(a)(1). That was the statute's avowed purpose: to "preempt[] Uniform Commercial Code provisions that insulate indirectly held assets from judgment creditors." Triedman, *supra*. Section 8772 thus altered *substantive* state property law for this case alone.

Likewise, prior to §8772's enactment, Bank Markazi had at least a reasonable argument that *Bancec* and the

Treaty of Amity prohibited attachment of its assets to satisfy judgments against the Iranian government. Compare pp. 27-28, *supra*, with Pet. App. 6a-7a. But §8772 changed that law too, creating a unique veil-piercing rule that applies solely to this one case. See 22 U.S.C. §8772(a)(1)(C), (d)(3). The statute thus altered *substantive* federal law—not just immunity. The Executive Branch's former authority to make case-by-case *immunity* decisions hardly licenses Congress to give case-by-case directions to federal courts over the governing *substantive* law.

The public rights doctrine might affect Congress's authority over claims against the *federal government*. The government's plenary power to expend its *own* funds, divest its *own* property, or waive its *own* immunity often includes power to dispense with Article III's requirements for claims concerning those functions. See *Stern*, 131 S. Ct. at 2612. But Congress cannot dispense with Article III's requirements for private tort claims against *other, non-consenting defendants*—whether publicly owned or private. See *Crowell* v. *Benson*, 285 U.S. 22, 50-51 (1932) (public rights doctrine traditionally inapplicable to disputes over "liability of one individual to another"); *Stern*, 131 S. Ct. at 2615 (doctrine inapplicable to "common law cause of action * * * [that] neither derives from nor depends upon any agency regulatory regime").

Whatever the scope of Congress's authority to revoke sovereign immunity, §8772 goes far beyond it by modifying substantive law—including state property law—for a single pending case between other parties. That is a domain that Article III reserves to the courts.

2. In any event, there is no reason to treat sovereign immunity differently. Sovereign immunity was formerly decided on a case-by-case basis by the Executive Branch.

See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486-488 (1983). But that does not prove that *Congress* can pass a statute revoking immunity for a single case. That is especially true now that Congress has replaced the former immunity regime with judicial determinations under defined statutory standards. One consequence is that Article III limits Congress's authority to alter those standards in a pending case. Congress can shift case-by-case immunity determinations from the Executive to the courts; it cannot shift those case-by-case determinations to itself.

The only other court of appeals to consider this issue expressed grave reservations. After detainees from the 1979 Iran hostage crisis tried to sue Iran, Congress enacted a new exception to sovereign immunity that applied solely to that case. See Pub. L. No. 107-77, §626(c), 115 Stat. 748, 803 (2001) (adding the words "or the act is related to Case Number 1:00CV03110(ESG) in the United States District Court for the District of Columbia" to existing immunity exception) (codified as amended at 28 U.S.C. §1605A(a)(2)(B)). The D.C. Circuit recognized that "it is open to question whether Congress may dictate the outcome of a particular judicial proceeding" and reserved judgment as to "whether the amendments, relating as they did specifically to a pending action, violated separation-of-powers principles by impermissibly directing the result of pending litigation." *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228, 237 & n.5 (D.C. Cir. 2003), cert. denied, 542 U.S. 915 (2004).

If Congress wanted to compensate these plaintiffs, there were any number of alternatives. Congress could have paid the claims out of public funds, as it has done in the past. See, *e.g.*, Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §2002(b)(2),

114 Stat. 1464, 1543. Or the political branches could have sought to negotiate compensation through diplomatic discussions. See *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943) (recognizing that the "national interest will be better served in such cases if the wrongs to suitors * * * are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings").

What Congress could not do is amend the law solely for this one case to ensure that plaintiffs would prevail. That is what § 8772 does. The statute is inconsistent with both the separation of powers and the rule of law. It cannot be upheld.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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RELEVANT CONSTITUTIONAL, STATUTORY, AND TREATY PROVISIONS

1. Article III of the United States Constitution provides:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

2. Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214, 1258, as codified at 22 U.S.C. § 8772, provides:

§ 8772. Interests in certain financial assets of Iran

(a) Interests in blocked assets

(1) In general

Subject to paragraph (2), notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law, a financial asset that is—

(A) held in the United States for a foreign securities intermediary doing business in the United States;

(B) a blocked asset (whether or not subsequently unblocked) that is property described in subsection (b); and

(C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad,

shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act.

(2) Court determination required

In order to ensure that Iran is held accountable for paying the judgments described in paragraph (1) and in furtherance of the broader goals of this Act to sanction

Iran, prior to an award turning over any asset pursuant to execution or attachment in aid of execution with respect to any judgments against Iran described in paragraph (1), the court shall determine whether Iran holds equitable title to, or the beneficial interest in, the assets described in subsection (b) and that no other person possesses a constitutionally protected interest in the assets described in subsection (b) under the Fifth Amendment to the Constitution of the United States. To the extent the court determines that a person other than Iran holds—

(A) equitable title to, or a beneficial interest in, the assets described in subsection (b) (excluding a custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran); or

(B) a constitutionally protected interest in the assets described in subsection (b),

such assets shall be available only for execution or attachment in aid of execution to the extent of Iran's equitable title or beneficial interest therein and to the extent such execution or attachment does not infringe upon such constitutionally protected interest.

(b) Financial assets described

The financial assets described in this section are the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings, as modified by court order dated June 27, 2008, and extended by court orders dated June 23, 2009, May 10, 2010,

and June 11, 2010, so long as such assets remain restrained by court order.

(c) Rules of construction

Nothing in this section shall be construed—

(1) to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than proceedings referred to in subsection (b); or

(2) to apply to assets other than the assets described in subsection (b), or to preempt State law, including the Uniform Commercial Code, except as expressly provided in subsection (a)(1).

(d) Definitions

In this section:

(1) Blocked asset

The term "blocked asset"—

(A) means any asset seized or frozen by the United States under section 5(b) of the Title 50, Appendix or under section 1701 or 1702 of Title 50; and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of the license has been specifically required by a provision of law other than the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) or the United Nations Participation Act of 1945 (22 U.S.C. 287 *et seq.*); or

(ii) is property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention

on Consular Relations, or that enjoys equivalent privileges and immunities under the laws of the United States, and is being used exclusively for diplomatic or consular purposes.

(2) Financial asset; securities intermediary

The terms "financial asset" and "securities intermediary" have the meanings given those terms in the Uniform Commercial Code, but the former includes cash.

(3) Iran

The term "Iran" means the Government of Iran, including the central bank or monetary authority of that Government and any agency or instrumentality of that Government.

(4) Person

(A) In general

The term "person" means an individual or entity.

(B) Entity

The term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.

(5) Terrorist party

The term "terrorist party" has the meaning given that term in section 201(d) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. 1610 note).

(6) United States

The term "United States" includes all territory and waters, continental, or insular, subject to the jurisdiction of the United States.

3. The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, as amended and codified at 28 U.S.C. §§ 1602 *et seq.*, provides:

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state

may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a

discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo

against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in

any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed.

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security opera-

tion, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this

section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other lia-

bility or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of

section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign

Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which para-

graph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwith-

standing any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

4. Section 201 of the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322, 2337, as amended and reproduced at 28 U.S.C. § 1610 note, provides:

(a) IN GENERAL.—Notwithstanding any other provision of law, and except as provided in subsection (b) [of this note], in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

(b) PRESIDENTIAL WAIVER.—

(1) IN GENERAL.—Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) [of this note] in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) EXCEPTION.—A waiver under this subsection shall not apply to—

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (in-

cluding use as rental property), or the proceeds of such use; or

(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(d) DEFINITIONS.—In this section [this note] the following definitions shall apply:

(1) ACT OF TERRORISM.—The term "act of terrorism" means—

(A) any act or event certified under section 102(1) [Pub. L. 107-297, Title I, § 102(1), Nov. 26, 2002, 116 Stat. 2323, which is set out in a note under 15 U.S.C.A. § 6701]; or

(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

(2) BLOCKED ASSET.—The term "blocked asset" means—

(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute

other than the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) or the United Nations Participation Act of 1945 (22 U.S.C. 287 *et seq.*); or

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) CERTAIN PROPERTY.—The term "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" and the term "asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(4) TERRORIST PARTY.—The term "terrorist party" means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).

5. The Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899, provides in relevant part:

The United States of America and Iran, desirous of emphasizing the friendly relations which have long prevailed between their peoples, of reaffirming the high principles in the regulation of human affairs to which they are committed, of encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations, have resolved to conclude, on the basis of reciprocal equality of treatment, a Treaty of Amity, Economic Relations, and Consular Rights, and have appointed as their Plenipotentiaries:

The President of the United States of America:

Mr. Selden Chapin, Ambassador Extraordinary and Plenipotentiary of the United States of America at Tehran;

and

His Imperial Majesty, the Shah of Iran:

His Excellency Mr. Mostafa Samiy, Under Secretary of the Ministry of Foreign Affairs;

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following articles:

* * * * *

ARTICLE III

1. Companies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party. It is understood, however, that recognition of juridical status does not of itself confer rights upon companies to engage in

the activities for which they are organized. As used in the present Treaty, "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit.

2. Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country. It is understood that companies not engaged in activities within the country shall enjoy the right of such access without any requirement of registration or domestication.

3. The private settlement of disputes of a civil nature, involving nationals and companies of either High Contracting Party, shall not be discouraged within the territories of the other High Contracting Party; and, in cases of such settlement by arbitration, neither the alienage of the arbitrators nor the foreign situs of the arbitration proceedings shall of themselves be a bar to the enforceability of awards duly resulting therefrom.

ARTICLE IV

1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded ef-

fective means of enforcement, in conformity with the applicable laws.

2. Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

3. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either High Contracting Party located within the territories of the other High Contracting Party shall not be subject to entry or molestation without just cause. Official searches and examinations of such premises and their contents, shall be made only according to law and with careful regard for the convenience of the occupants and the conduct of business.

4. Enterprises which nationals and companies of either High Contracting Party are permitted to establish or acquire, within the territories of the other High Contracting Party, shall be permitted freely to conduct their activities therein, upon terms no less favorable than other enterprises of whatever nationality engaged in similar activities. Such nationals and companies shall enjoy the right to continued control and management of such enterprises; to engage attorneys, agents, accountants and other technical experts, executive personnel, interpreters and other specialized employees of their choice; and to do

all other things necessary or incidental to the effective conduct of their affairs.

ARTICLE V

1. Nationals and companies of either High Contracting Party shall be permitted, within the territories of the other High Contracting Party: (a) to lease, for suitable periods of time, real property needed for their residence or for the conduct of activities pursuant to the present Treaty; (b) to purchase or otherwise acquire personal property of all kinds; and (c) to dispose of property of all kinds by sale, testament or otherwise. The treatment accorded in these respects shall in no event be less favorable than that accorded nationals and companies of any third country.

2. Upon compliance with the applicable laws and regulations respecting registration and other formalities, nationals and companies of either High Contracting Party shall be accorded within the territories of the other High Contracting Party effective protection in the exclusive use of inventions, trade marks and trade names.

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ARTICLE XI

1. Each High Contracting Party undertakes (a) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales involving either imports or exports affecting the commerce of the other High Contracting Party solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale; and (b) that the nationals, companies and commerce of such other High Contracting Party shall be afforded ade-

quate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales.

2. Each High Contracting Party shall accord to the nationals, companies and commerce of the other High Contracting Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of any third country, with respect to: (a) the governmental purchase of supplies, (b) the awarding of government contracts, and (c) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special privileges.

3. The High Contracting Parties recognize that conditions of competitive equality should be maintained in situations in which publicly owned or controlled trading or manufacturing enterprises of either High Contracting Party engage in competition, within the territories thereof, with privately owned and controlled enterprises of nationals and companies of the other High Contracting Party. Accordingly, such private enterprises shall, in such situations, be entitled to the benefit of any special advantages of an economic nature accorded such public enterprises, whether in the nature of subsidies, tax exemptions or otherwise. The foregoing rule shall not apply, however, to special advantages given in connection with: (a) manufacturing goods for government use, or supplying goods and services to the Government for government use; or (b) supplying at prices substantially below competitive prices, the needs of particular population groups for essential goods and services not otherwise practically obtainable by such groups.

4. No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned

or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

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ARTICLE XXI

1. Each High Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other High Contracting Party may make with respect to any matter affecting the operation of the present Treaty.

2. Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

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6. Article 8 of the Uniform Commercial Code provides in relevant part:

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§ 8-102. Definitions.

(a) In this Article:

* * * * *

(14) "Securities intermediary" means:

(i) a clearing corporation; or

(ii) a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.

* * * * *

(17) "Security entitlement" means the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5.

* * * * *

§ 8-112. Creditor's Legal Process.

(a) The interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy, except as otherwise provided in subsection (d). However, a certificated security for which the certificate has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.

(b) The interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer at its chief executive office in the United States, except as otherwise provided in subsection (d).

(c) The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon

the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in subsection (d).

(d) The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.

(e) A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.

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[OFFICIAL COMMENT]

3. Subsection (c) provides that a security entitlement can be reached only by legal process upon the debtor's security intermediary. Process is effective only if directed to the debtor's own security intermediary. If Debtor holds securities through Broker, and Broker in turn holds through Clearing Corporation, Debtor's property interest is a security entitlement against Broker. Accordingly, Debtor's creditor cannot reach Debtor's interest by legal process directed to the Clearing Corporation. See also Section 8-115.

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§ 8-504. Duty of Securities Intermediary to Maintain Financial Asset.

(a) A securities intermediary shall promptly obtain and thereafter maintain a financial asset in a quantity corresponding to the aggregate of all security entitlements it has established in favor of its entitlement holders with respect to that financial asset. The securities intermediary may maintain those financial assets directly or through one or more other securities intermediaries.

(b) Except to the extent otherwise agreed by its entitlement holder, a securities intermediary may not grant any security interests in a financial asset it is obligated to maintain pursuant to subsection (a).

(c) A securities intermediary satisfies the duty in subsection (a) if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to obtain and maintain the financial asset.

(d) This section does not apply to a clearing corporation that is itself the obligor of an option or similar obligation to which its entitlement holders have security entitlements.

§ 8-505. Duty of Securities Intermediary With Respect to Payments and Distributions.

(a) A securities intermediary shall take action to obtain a payment or distribution made by the issuer of a financial asset. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to attempt to obtain the payment or distribution.

(b) A securities intermediary is obligated to its entitlement holder for a payment or distribution made by the issuer of a financial asset if the payment or distribution is received by the securities intermediary.

§ 8-506. Duty of Securities Intermediary to Exercise Rights as Directed by Entitlement Holder.

A securities intermediary shall exercise rights with respect to a financial asset if directed to do so by an entitlement holder. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary either places the entitlement holder in a position to exercise the rights directly or exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

§ 8-507. Duty of Securities Intermediary to Comply With Entitlement Order.

(a) A securities intermediary shall comply with an entitlement order if the entitlement order is originated by the appropriate person, the securities intermediary has had reasonable opportunity to assure itself that the entitlement order is genuine and authorized, and the securities intermediary has had reasonable opportunity to

comply with the entitlement order. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to comply with the entitlement order.

(b) If a securities intermediary transfers a financial asset pursuant to an ineffective entitlement order, the securities intermediary shall reestablish a security entitlement in favor of the person entitled to it, and pay or credit any payments or distributions that the person did not receive as a result of the wrongful transfer. If the securities intermediary does not reestablish a security entitlement, the securities intermediary is liable to the entitlement holder for damages.

§ 8-508. Duty of Securities Intermediary to Change Entitlement Holder's Position to Other Form of Security Holding.

A securities intermediary shall act at the direction of an entitlement holder to change a security entitlement into another available form of holding for which the entitlement holder is eligible, or to cause the financial asset to be transferred to a securities account of the entitlement holder with another securities intermediary. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with rea-

sonable commercial standards to follow the direction of the entitlement holder.

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